



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Denial of a Driveway Permit to  
Bette J. Cherwenka

Case No. TR-00-0037

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**FINAL RULING ON MOTION TO DISMISS  
AND MOTION FOR SUMMARY JUDGMENT**

On March 29, 2000, Bette Cherwenka filed an application pursuant to sec. 86.07(2), Stats., seeking a permit for driveway access to State Trunk Highway 64 (STH 64). By letter dated April 28, 2000, District 7 of the Department of Transportation denied the application. On August 2, 2000, Ms. Cherwenka filed a letter with the Department of Transportation (Department) seeking a variance that would allow her to construct a driveway access to her property. By letter dated August 14, 2000, the Department also denied this request. On September 28, 2000, Ms. Cherwenka filed a request for a hearing before the Division of Hearings and Appeals (Division) to review the Department's denial.

On October 23, 2000, the Department filed a Motion to Dismiss Ms. Cherwenka's request for a hearing and, in the alternative, a Motion for Summary Judgment along with a brief and affidavits in support of the motions. Ms. Cherwenka filed a response to the motions on October 31, 2000, and the Department filed a reply brief on November 7, 2000. On November 13, 2000, the Lincoln County Register of Deeds filed a certified copy of a "Surveyor's Correction Affidavit" with the Division. The affidavit is from William Nutter and provides that in his surveyor's certification he stated that he "surveyed, divided, and mapped" the parcel of land now owned by Ms. Cherwenka and the certification should have read that Mr. Nutter only "surveyed and mapped" the parcel. Ms. Cherwenka was given an opportunity to explain the significance of the surveyor's correction and on November 14, 2000, filed a letter containing her explanation.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Bette J. Cherwenka  
N1679 Spile Dam Road  
Merrill, WI 54452

Wisconsin Department of Transportation, by

Paul E. Nilsen, Assistant General Counsel  
Office of General Counsel  
P. O. Box 7910  
Madison, WI 53707-7910

The Administrative Law Judge issued a proposed ruling granting the motion to dismiss the request for hearing on November 16, 2000. On December 1, 2000, Bette Cherwenka filed objections to the Proposed Ruling. No comments on the Proposed Ruling were filed by the Department. In her objections, Ms. Cherwenka objects to the finding that she abandoned her application for a driveway access permit and instead sought a variance to the access restrictions required pursuant to Ch. Trans 233, Wis. Adm. Code from the Department. As discussed in the Proposed Ruling, although Ms. Cherwenka did initially submit an application pursuant to sec. 86.07(2), Stats., for a driveway access permit, either this was intended as a request for a variance pursuant to Ch. Trans 233.11, Wis. Adm. Code, or she subsequently abandoned the application for a driveway access permit and sought a variance from the Department.

Her letter received by the Department on August 2, 2000, expressly states "this is my request for a *variance* on my driveway application." (emphasis added) No where in that letter or in her subsequently request for a hearing before the Division did Ms. Cherwenka state that she was seeking a review of the Department's denial of her application for a driveway access permit. It is understood that Ms. Cherwenka is simply seeking access to her property from STH 64 at the location she prefers and it makes no difference to her whether this access is gained by a driveway access permit or by a variance. However, for jurisdictional purposes, it is important to determine whether she is seeking this access via a driveway access permit issued pursuant to sec. 86.07(2), Wis. Stats., or as a variance from the requirements of Ch. Trans 233, Wis. Adm. Code. The Division of Hearings and Appeals only has jurisdiction to review the denial of an application for a driveway access permit filed pursuant to sec. 86.07(2), Wis. Stats. As discussed in the Proposed Ruling, this is not the avenue Ms. Cherwenka is pursuing and the Division has no authority to review the Department's denial of her request for a variance.

In her objections, Ms. Cherwenka also again raises the argument that the current version of Ch. Trans 233, Wis. Adm. Code does not apply to the parcel of property she purchased. This issue is adequately addressed in the Proposed Ruling and for the reasons set forth in the Proposed Ruling, Ms. Cherwenka's objection is not persuasive. The Proposed Ruling is adopted as the Final Ruling in this matter.

## BACKGROUND

Gerald and Louise Doescher (the Doeschers) owned a parcel of property that fronts on STH 64 and has the legal description of the W ½ of the NW ¼ of the NE ¼ of Sec. 25 T 31 N, R 4 E, Town of Corning, Lincoln County. At some point in time the Doeschers subdivided the property into a 9.22 acre parcel (Lot 1) and a 9.20 acre parcel (Lot 2). On July 27, 1999, land surveyor William Nutter submitted to the Wisconsin

Department of Transportation Division of Transportation Districts, District 7 (District 7) a Certified Survey Map (CSM) for the property for review pursuant to Chap. Trans 233, Wis. Adm. Code. The CSM states that the subject property was “surveyed, divided and mapped by order of Louise Doescher.” By letter dated August 19, 1999, District 7 notified Mr. Nutter that the Department did “not object to the subject final CSM plat as submitted and so approve[d] [it] in accordance with the provisions of Chapter TRANS 233, Wisconsin Administrative Code.”<sup>1</sup> The CSM restricts the property as follows:

Restricting [sic] access is restricted to both lots so that no owner, possessor, user, licensee or other person may have any right of direct vehicular ingress from or egress to any highway lying within the right-of-way of S.T.H. 64, as shown on the land division map; it is expressly intended that this restriction constitute a restriction for the benefit of the public as provided in s. 236.93, Stats., and shall be enforceable by the department or its assigns. Access as shown may be permitted by the department through the driveway permitting process. Permits are revocable.

On September 2, 1999, the Department received a request for a variance for the Doescher CSM to allow an existing driveway access onto STH 64 (shown on the CSM) to serve the two lots as a joint driveway. The Department granted the variance. On September 7, 1999, Ms. Cherwenka purchased Lot 1 from the Doeschers.<sup>2</sup> On March 29, 2000, Ms. Cherwenka submitted to District 7 an application pursuant to sec. 86.07(2), Stats., for a permit to construct a new driveway as a second point of access to her property from STH. 64. On April 28, 2000, District 7, by letter from Brad Kimball, summarily denied Mrs. Cherwenka's application to construct a new driveway access.

Some time after receiving the letter denying her application, Mrs. Cherwenka contacted Brad Kimball requesting further review of her application for a driveway access permit. Mr. Kimball suggested that Mrs. Cherwenka contact the Department's central office in Madison for further review. On July 28, 2000, Ms. Cherwenka submitted a written request to John Haverberg, the Director of the Department's Bureau of Highway Development, “for a variance on [her] driveway application.” In her request for a variance, Mrs. Cherwenka expressed concern that to use the existing driveway for her proposed home she would have to clear over one acre of trees, remove the tree

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<sup>1</sup> Mr. Nutter subsequently filed a surveyor's correction affidavit with the Lincoln County Register of Deeds stating that the survey should have read that he “surveyed and mapped” the parcel, not “surveyed, divided, and mapped” it. In a letter dated October 26, 2000, Mr. Nutter similarly explained that the parcel were not created by Lincoln Land Survey (Mr. Nutter's surveying company), but was merely mapped and monumented by his company. As further proof of the fact that the Doescher property had been subdivided prior to the submission of the CSM by Mr. Nutter on July 27, 1999, Ms Cherwenka submitted with her November 14, 2000 filing a copy of a page from the 1998 Lincoln County real estate tax roll showing two separate parcels listed as owned by the Doeschers. Although the Doescher property was divided before 1999, neither party has submitted a CSM prepared prior to the one prepared by Mr. Nutter. Even if another surveyor divided the parcel, Mr. Nutter apparently prepared the first CSM for the subdivided parcel.

<sup>2</sup> Lot 1 of CSM 1306 was conveyed from Gerald W. Doescher and Louise A. Doescher to Bette Cherwenka by warranty deed. The warranty deed also conveyed to Ms. Cherwenka a perpetual easement for ingress and egress over and across the existing driveway where now situated from STH 64. The warranty deed specifically lists as exceptions to warranties all restrictions, reservations, easements, and rights-of-way of record.

stumps, and work around underground utility lines. She also expressed concern for the safety of the neighbor's children if she used the joint driveway.

By letter dated August 14, 2000, Mr. Haverberg declined to release or waive the access restrictions on Mrs. Cherwenka's property. Mr. Haverberg stated in his letter that Ms. Cherwenka's property was restricted by the CSM prepared for the previous owners of the property. Access to her property from STH 64 was restricted to the joint driveway shown on the CSM. Mr. Haverberg also indicated in his letter that Mrs. Cherwenka may seek review of the Department's decision by requesting a hearing before the Division of Hearings and Appeals. Mrs. Cherwenka did request that the Division of Hearings and Appeals hold a hearing.

## DISCUSSION

The factual background set forth above is derived from the affidavits of Robert H. Winat and John Haverberg filed by the Department. In her responses, Ms. Cherwenka does not dispute the facts as set forth by the Department. Bette Cherwenka purchased property that was restricted with respect to direct vehicular access to STH 64. The CSM does show a shared driveway access for Ms. Cherwenka's property and the neighboring property at the lot line between the two properties. Despite the restriction, Ms. Cherwenka filed an application pursuant to sec. 86.07(2), Stats., seeking a permit for a separate driveway access from her property to STH 64.

District 7 summarily denied the application. Pursuant to sec. 86.073(1), Stats., Ms. Cherwenka had a right to request the Department to review the District 7's denial. Such a request needed to be filed within thirty days of the denial. Ms. Cherwenka did submit a letter to the Department. This letter was postmarked July 28, 2000, and received by the Department on August 2, 2000. Although the letter dealt with Ms. Cherwenka's request for a driveway access to her property, it was not styled as a request to review District 7's denial of her application for a driveway access permit. Rather, it is a request for a variance, presumably pursuant to sec. Trans 233.11, Wis. Adm. Code.<sup>3</sup>

The Department responded to Ms. Cherwenka's request for a variance by letter dated August 14, 2000, from John Haverberg. Mr. Haverberg's letter begins "I have received and reviewed with staff your request to appeal the District 7 decision to deny an access to your property from STH 64. I agree with the District and uphold their denial." This statement would suggest that the Department did treat Ms. Cherwenka's letter as a request pursuant to sec. 86.073(1), Stats., to review District 7's denial of her request for a driveway access permit. Although, the Department referred to Ms. Cherwenka's letter as an appeal filed pursuant to sec. 86.073(1), Stats., the basis for the Department's denial is that Ms. Cherwenka's property has been restricted pursuant to the CSM and she has no right to the driveway access which she applied for. The Department treated the request as a request for a variance pursuant to sec. Trans 233.11, Wis. Adm. Code. In his affidavit, Mr. Haverberg stated that he "considered Ms. Cherwenka's

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<sup>3</sup> Even if Ms. Cherwenka's July 28<sup>th</sup> letter could be construed as a request to review District 7's denial, it would not have been a timely request. The deadline for filing such a request would have been May 28, 2000.

request as a request to release or waive a recorded restriction against direct vehicular access to and from her property and S.T.H. 64.”

Ms. Cherwenka's response to the Department's motions clearly demonstrates that at this point she is seeking a variance to the restriction in the CSM. Presumably, Ms. Cherwenka's initial application was also intended not as an application for a driveway access permit pursuant to sec. 86.072(2), Stats., but as a request for a variance. Furthermore, even if Ms. Cherwenka initially did intend to file an application for a driveway access permit, she clearly subsequently abandoned this application and was seeking a variance. The Department also clearly treated her letter as a request for a variance. Despite Mr. Haverberg's statement in his August 19<sup>th</sup> letter that Ms. Cherwenka has “the right to appeal [the Department's] decision to the State of Wisconsin, Division of Hearings and Appeals,” the Division of Hearings and Appeals has no jurisdiction to review the Department's denial of a request for variance made pursuant to sec. Trans 233.11, Wis. Adm. Code. Accordingly, the Division of Hearings and Appeals has no jurisdiction in this matter and the Department's Motion to Dismiss must be granted for lack of jurisdiction.

As a separate issue, Ms. Cherwenka argues that the Doeschers divided their property prior to the effective date of Chap. Trans 233, Wis. Adm. Code. She argues that the restriction in the CSM with respect to driveway access in CSM prepared by William Nutter, therefore, was not required. Setting aside the question of what legal effect the restriction existing in the CSM should be given if the restriction was not required to be placed in the CSM, Ms. Cherwenka's argument is not persuasive for two reasons. The first reason is that although the Doeschers may have subdivided the property prior to the effective date of Chap. Trans 233, Wis. Adm. Code, in its current state, apparently no CSM was prepared or approved for the subdivision. Mr. Nutter may not have divided the property; however, he did survey and map the property. The CSM prepared by Mr. Nutter was the CSM submitted to the Department for approval of the subdivision of the Doescher property. Mr. Nutter prepared the CSM after the effective date of Chap. Trans 233, Wis. Adm. Code, in its current state and the CSM was subject to its requirements.<sup>4</sup>

The other reason Ms. Cherwenka's argument is not persuasive is that even if one believed that the fact that the Doescher property was divided prior to the effective date of Chap. Trans 233, Wis. Adm. Code, in its current state and was, therefore, not subject to its requirements, then

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<sup>4</sup> Sec. Trans 233.05(1), Wis. Adm. Code, provides:

No land divider may divide land in such a manner that a private road or driveway connects with a state trunk highway or connecting highway or any service road lying partially within the right-of-way of a state trunk highway or connecting highway, unless the land divider has received a variance for that purpose approved by the department under s. Trans 233.11. The following restriction shall be placed on the face of the land division map, or as part of the owner's certificate required under s. 236.21 (2) (a), Stats., and shall be executed in the manner specified for a conveyance:

“As owner I hereby restrict all lots and blocks so that no owner, possessor, user, licensee or other person may have any right of direct vehicular ingress from or egress to any highway lying within the right-of-way of (U.S.H.) (S.T.H.) \_\_\_\_\_ or \_\_\_\_\_ Street, as shown on the land division map; it is expressly intended that this restriction constitute a restriction for the benefit of the public as provided in s. 236.293, Stats., and shall be enforceable by the department or its assigns.”

the CSM would have been controlled by the regulations in effect at the time the property was divided. The requirements for certified survey maps were previously controlled by Chap. HWY 33, Wis. Adm. Code. Chap. HWY 33, Wis. Adm. Code, became effective in 1956, was renumbered as Chap. Trans 233, Wis. Adm. Code, in 1996, and continued in effect until January 31, 1999. It was then repealed and a new Chap. Trans 233, Wis. Adm. Code, was created and became effective on February 1, 1999. Chap. HWY 33, Wis. Adm. Code had a nearly identical provision regarding restrictions for driveway access to state trunk highways as the current Chap. Trans 233, Wis. Adm. Code.<sup>5</sup> If Mr. Nutter, had prepared a certified survey map at the time the property was divided, the same access restriction would have had to have been placed in the CSM before the Department would have approved the platting of this parcel. The restriction in the certified survey map is valid and pursuant to that restriction, Ms. Cherwenka is not entitled to a separate driveway access to her property from STH 64.

Since the Motion to Dismiss the request for hearing is granted, there is no need to address the Department's arguments in its alternative Motion for Summary Judgment. However, it should be noted that the issue for a review of the denial of an application for a driveway access permit is whether the landowner has reasonable ingress and egress to the property. In the instance case, Ms. Cherwenka does have access to her property. Her application is for a separate driveway access that would be more convenient with respect to the site on the property she has chosen for her home. Although the site for a driveway proposed by Ms. Cherwenka would undoubtedly be preferable to her, the fact remains that she does have reasonable access to her property from the existing shared driveway access noted on the CSM.

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<sup>5</sup> Sec. HWY 33.05(1), Wis. Adm. Code, provided:

There shall be no direct vehicular access between the state trunk highway and the individual lots or parcels in the subdivision without the express consent of the commission. The following restriction shall be appropriately placed on the face of the plat and shall be executed as a conveyance is executed. (It may be made a part of the owner's certificate required by s. 236.21(2)(a), Stats.);

As owner I hereby restrict all lots and blocks (except Lot \_\_\_\_ Block \_\_\_\_), in that no owner, possessor, user, nor licensee, nor other person shall have any right of direct vehicular ingress or egress with (U.S.H.) (S.T.H.) \_\_\_\_\_ or \_\_\_\_\_ Street, as shown on the plat; it being expressly intended that this restriction shall constitute a restriction for the benefit of the public according to s. 236.293, Stats., and shall be enforceable by the state highway commission.

PROPOSED RULING

For the reasons set forth above, the Department of Transportation's Motion to Dismiss the request for hearing filed by Bette Cherwenka with the Division of Hearings and Appeals is GRANTED.

Dated at Madison, Wisconsin on December 8, 2000.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By \_\_\_\_\_  
DAVID H. SCHWARZ  
ADMINISTRATOR

## **NOTICE**

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.